(10)

No. 92-8841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KITRICH A. POWELL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

1. Has a federal question been properly preserved for review in this Court?

2. Are *Gerstein* v. *Pugh* and *County of Riverside* v. *McLaughlin* to be enforced by means of excluding valid, probative, otherwise admissible evidence?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the defendant claims that relevant, probative evidence should be excluded from criminal trials on a ground with little or no bearing on the reliability of that evidence. Such an impairment of the truth-seeking function is contrary to the interest CJLF was formed to protect.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

A copy of the arrest report is attached as Exhibit 4 to the Respondent's Brief in Opposition to the Certiorari Petition. According to the report, defendant/petitioner Kitrich Powell was arrested at 3:00 p.m. on November 3, 1989, a Friday, for felony child abuse of Melea Allen, age four. The report is time-stamped 3:42 p.m., less than an hour after arrest. On the bottom of the form there is a finding of probable cause signed by a judge dated Tuesday, November 7, but with no indication of the time.

There is no indication that Powell was present at the judge's determination of probable cause. His state appellate brief asserts that he was not presented to a magistrate until November 13. Brief in Opposition, Exhibit 1, p. 82 of Appeal Brief; *Powell* v. *State*, 838 P. 2d 921, 924 (Nev. 1992).

On November 3, the day of arrest, and again on November 7, the same day the judge found probable cause, Powell made statements to the police which included damaging admissions. *Powell*, 838 P. 2d, at 924. It is not clear whether the November 7 statement was made before or after the November 7 probable cause determination; for the sake of argument *amicus* will assume it was before. Powell was not in custody at the time of the November 3 statement. *Id*., at 925. He was advised of and waived his *Miranda* rights before the November 7 statement. *Ibid*.

Melea Allen subsequently died of her injuries. Powell was charged with murder, convicted, and sentenced to death. *Id*., at 923.

On appeal, Powell's delayed-appearance argument was based on a state statute. *Id*., at 923-924. However, the state court *sua sponte* addressed the impact of *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) on state initial appearance procedure. Although the statute, Nev. Rev. Stat. § 171.178, makes no mention

of probable cause determination, the court found that the forty-eight hour standard of *McLaughlin* superseded the seventy-two hours plus weekend standard in the statute. 838 P. 2d, at 924. However, the court held this ruling did not apply retroactively. *Id*., at 924, n. 1. The court then went on to hold in the alternative that "Powell waived his right to an appearance before a magistrate within seventy-two hours." *Id*., at 925.

Represented by new counsel, Powell petitioned this Court for a writ of certiorari. The question presented in the petition was "May a state court decline to apply a controlling Fourth Amendment decision of this court to a case pending before it on direct appeal with impunity, in spite of *Griffith* v. *Kentucky*." Petition for Writ of Certiorari i. This Court granted the writ on October 4, 1993.

SUMMARY OF ARGUMENT

The court below did not address *sua sponte* the question petitioner now seeks to raise. The court only addressed the impact of *County of Riverside* v. *McLaughlin* on its decision, as a matter of state law, to combine the *Gerstein* hearing with the state initial appearance procedure.

Statements made during an interval when the criminal justice system is in violation of *Gerstein/McLaughlin* should not be excluded from evidence for that reason alone. The evidence is not obtained by exploitation of the violation. The costs of exclusion outweigh the benefits.

ARGUMENT

There are two assumptions contained within the question presented as framed by defendant/petitioner Powell. First, that the state court reached and decided a federal constitutional question, and, second, that *Gerstein*

v. *Pugh*, 420 U. S. 103 (1975) and *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991) are to be enforced by means of excluding otherwise admissible evidence. Neither proposition is self-evident.

I. The state court does not appear to have addressed a federal question *sua sponte*.

The opinion of the Nevada Supreme Court in the present case is not a model of clarity. Upon closer examination, however, it appears that the court was not addressing suppression of confessions as a remedy for *Gerstein/McLaughlin* violations, but rather determining how, in the future, the requirements of *Gerstein* and *McLaughlin* would be met within Nevada's statutory pretrial procedures. This discussion is within the context of deciding a claim made purely under state law.

Defendant contended in the state appeal, see *Powell* v. *State*, 838 P. 2d 921, 923 (Nev. 1992), and repeats in this Court, see Brief of Petitioner 8, that Nevada law excludes confessions when the state fails to comply with the state prompt arraignment statute, Nev. Rev. Stat. § 171.178. In other words, he contends that Nevada is one of the few states to follow a rule of exclusion similar to *McNabb* v. *United States*, 318 U. S. 332 (1943).

Few propositions are better settled than the nonconstitutional status of *McNabb*. Over and over, this Court has reiterated that *McNabb* is not constitutionally compelled and does not apply to the states. *Brown* v. *Allen*, 344 U. S. 443, 476 (1953). Whether Nevada has a state *McNabb* rule and whether the state court applied it correctly in this case simply are not federal questions. See *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

The state court begins its discussion of *McLaughlin* with this statement: "We initially note that the United States Supreme Court has provided additional guidance

on the issue of what constitutes a timely initial appearance." 838 P. 2d, at 924. However, it is very clear that *Gerstein* only permits and does not require states to combine the probable cause determination with the initial appearance. See *Gerstein*, 420 U. S., at 121-122; *McLaughlin*, 114 L. Ed. 2d, at 62, 111 S. Ct., at 1669. A holding that the *McLaughlin* deadline applies to the statutory initial appearance procedure is an implicit holding, as a matter of *state* law, that the two proceedings are to be combined.

Powell's statutory initial appearance was not overdue, under the terms of the statute, at the time he made his November 7 statement. Only a state law requirement to combine that proceeding with the *Gerstein* determination would render the combined proceeding overdue under *McLaughlin*. If the state court decides to follow the old rule of *Tehan* v. *Shott*, 382 U. S. 406 (1966) for the retroactivity of this state joinder rule, that is its prerogative. "Sound or unsound, there is involved in it no denial of a right protected by the federal constitution." *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 364 (1932).

In the present case, the *Gerstein* determination and the initial appearance were not combined. The probable cause determination was made November 7, and the initial appearance was six days later. 838 P. 2d, at 924. Nowhere does the state court discuss the untimeliness of the probable cause determination, rather than the initial appearance, as a ground for exclusion. Defendant did not raise such a claim, and, as *amicus* will discuss in the next part, there is minimal authority for such a claim.

It appears, therefore, that a federal question regarding exclusion of the statement on the ground now asserted was neither raised by defendant nor addressed by the court below.

II. The causal link between a *Gerstein* violation and a confession is insufficient to warrant exclusion.

Defendant asserts that under federal law, a violation of *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991), by itself, absent any other constitutional issues, requires reversal of the conviction. Brief for Petitioner 8. *Amicus* submits that it does not. Not in this case. Not in any case.

Both *McLaughlin* and the underlying case of *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) were civil class actions for declaratory and injunctive relief. *Gerstein*, 420 U. S., at 106-107; *McLaughlin*, 114 L. Ed. 2d, at 57, 111 S. Ct., at 1665. In neither case was exclusion of evidence as a remedy ever mentioned. The only reference to review of the criminal prosecution in *Gerstein* is contrary to defendant's position. "[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein*, 420 U. S., at 119.

The question of whether *McLaughlin* is even relevant, much less "controlling," remains open. The leading treatise on the Fourth Amendment cites only a handful of cases on the question. 2 W. LaFave, Search and Seizure, § 5.1(f), p. 425 (2d ed. 1987). After noting one argument against a suppression remedy, LaFave merely comments "It is not obvious, however, that such analysis is correct . . . ." *Ibid*. Neither is it obvious that the contrary argument is correct.

The question of whether *Gerstein* and *McLaughlin* are to be enforced by the exclusion of otherwise admissible evidence is both wide open and "fairly included" within the question presented. See Supreme Court Rule 14.1(a). It is a " 'predicate to an intelligent resolution' of the question on which [the Court] granted certiorari . . . ." *Cuyler* v. *Sullivan*, 446 U. S. 335, 342, n. 6 (1980). For the reasons that follow, *amicus* CJLF submits that the correct answer to the question is a simple "no."

A. Defining the Situation.

Before proceeding to the merits, a look at what is *not* at issue here would be prudent. This is not a case about involuntary confessions. Defendant notes, correctly, that extended detention can be used as a form of coercion. Brief for Petitioner 9. No one doubts that proposition. Indeed, for federal courts Congress has explicitly directed that this factor be considered. 18 U. S. C. § 3501(b)(1). But it is only one factor. Before the statement can be used as evidence, the prosecution must prove it was voluntary. *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972).

Neither is this a case about noncompliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) or any of the rules of "prophylaxis built upon prophylaxis" which have accrued since. See *Minnick* v. *Mississippi*, 498 U. S. 146, 166 (1990) (Scalia, J., dissenting). Such noncompliance is an independent ground for exclusion.

This is also not a case about people arrested without probable cause. The defendant can move for exclusion on that ground, and, if probable cause is found lacking, the exclusion decision is governed by *Brown* v. *Illinois*, 422 U. S. 590, 603-604 (1975). The present question only arises, then, if the defendant was arrested *with* probable cause, was advised pursuant to *Miranda*, and made a voluntary statement.

In what appears to be the only law review article on the subject, Professor George Thomas asserts that the present question involves all arrests in which evidence is revealed during the period of a *Gerstein* violation, regardless of whether there was probable cause to arrest. His reason for this assertion is that, by definition, there has been no probable cause determination at the time the evidence is obtained, and therefore probable cause is an unknown quantity. Thomas, The Poisoned Fruit of Pretrial Detention, 61 N.Y.U. L. Rev. 413, 417-418 (1986).

Professor Thomas' thesis does not withstand examination. The critical question is whether to admit the gathered evidence at trial. The time of trial, not the time of questioning, is the time at which we evaluate what is known and unknown. Defendant can challenge probable cause for the arrest by moving for suppression under *Brown* v. *Illinois*, *supra*. Only if that motion is unsuccessful, or if it is not made because probable cause is obvious, does a *Gerstein* suppression question arise.

If, at the time the evidence is offered, *Gerstein* is the only remaining ground for objection, then probable cause to arrest has either been established or conceded. The question of exclusion under *Gerstein* must proceed on the assumption that the arrest was made *with* probable cause.

Finally, the only confessions at issue are those made after the *Gerstein* promptness time has expired and before the probable cause determination has been made. Even under the extremely harsh rule applicable in federal courts,[2] a delay in presentment does not reach back to "taint" a statement made promptly after arrest. *United States* v. *Mitchell*, 322 U. S. 65, 69-70 (1944). It would be absurd to argue for an even more stringent rule to apply to the states. See *id*., at 67-68. In the present case, there is no *Gerstein* issue with regard to the November 3 statement.

At the other end of the interval, there is no issue as to statements made after the magistrate has found probable cause. Once the suspect has been legally committed by a judicial officer, evidence obtained after that point is not the "fruit" of the earlier police conduct. *Johnson* v. *Louisiana*, 406 U. S. 356, 365 (1972). At the most, then, we are dealing with an interval of time when judicial confirmation of probable cause is overdue. Is this

2. This rule is presently before the Court in *United States* v. *Alvarez-Sanchez*, No. 92-1812.

interval an "interrogation-free zone" from which any statements will be excluded at trial? That is the question.

B. "But For" Causation.

The Fourth Amendment addresses searches and seizures, not confessions. U. S. Const. Amdt. 4; cf. *id*., Amdt. 5. Any motion to suppress a confession on Fourth Amendment grounds must therefore depend on a "fruit of the poisonous tree" argument. See *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). Such an argument involves two issues. There must be a causal link such that the confession is indeed a result of the violation, and that link must be strong enough that exclusion is justified. The first issue is a question of logic; the second is "a matter of good sense." *Id*., at 341.

This Court's "cases make clear that evidence will not be excluded as 'fruit' unless the illegality is *at least* the 'but for' cause of the discovery of the evidence." *Segura* v. *United States*, 468 U. S. 796, 815 (1984) (emphasis added). In other words, there is a minimum requirement that if the violation had not occurred, the state would not have the evidence. If this logical causal link is missing, the evidence is admissible without getting into any questions of attenuation, strength of linkage, or cost-benefit analysis. "But for" causation is a necessary condition, though not a sufficient one, for suppression.

In *Segura*, the police had entered an apartment, and a warrant was later obtained with information already possessed by the police prior to that entry. The challenged evidence was obtained during the search with the valid warrant. *Id*., at 814. Since the evidence was obtained as a result of the legal warrant search and not the challenged warrantless entry, "not even the threshold 'but for' requirement was met in this case." *Id*., at 815.

To the same effect is *United States* v. *Crews*, 445 U. S. 463 (1980). In that case, the victim of the crime identified the defendant in court and had previously identified

him from a photograph taken during an illegal detention. *Id.*, at 467-468. The detention was simply not the cause of the in-court identification. *Id.*, at 473.

New York v. *Harris*, 495 U. S. 14 (1990) comes the closest to the present case. The police arrested Harris in his home with probable cause but without the required warrant. At the station, he admitted killing the victim. *Id.*, at 15-16; see *Payton* v. *New York*, 445 U. S. 573, 576 (1980) (warrant required for in-home arrest).

Harris had been illegally arrested, his custody was the result of that arrest, and the statement was the result of the custody, but even so the Court held that the statement was not the product of the illegality. Although the *manner* in which Harris was taken into custody was unlawful, that manner had no causal effect on the statement. It was not "the fruit of having been arrested in the home rather than someplace else." *Harris*, 495 U. S., at 19.

This facet of the *Harris* opinion is precisely analogous to the present case. There are several ways to comply with *Gerstein*, if permitted by local procedure, which would have no impact whatever on a suspect's willingness to confess, since the suspect need not even be aware of them. The police could obtain an arrest warrant, see *Gerstein*, 420 U. S., at 116, n. 18, have a *Gerstein* determination made *ex parte*, see *id.*, at 121-122 (confrontation not required), or have the suspect indicted by a grand jury, see *id.*, at 117, n. 19.[3] The police's failure to do any of these things promptly is in no way a cause of the suspect's decision to confess. The delay is a breach of the law, but the confession was not "come at by exploitation" of that breach. See *Harris*, *supra*, 495 U. S., at 19 (internal quotation marks omitted).

3. Indictment does not preclude questioning if defendant is advised of and waives his right to counsel, *Patterson* v. *Illinois*, 487 U. S. 285, 296-297 (1988), and the standard *Miranda* warning is sufficient, *id.*, at 298.

There is another facet of *Harris*, however, which could arguably be the converse of the present situation. The police's custody of Harris began illegally, but Harris was not unlawfully in custody at the time of the statement, because the police had probable cause to arrest him. It could be argued in the present case that the police's custody of Powell began legally but had become illegal by the time of the statement, due to the lapse of time without a probable cause determination.

To resolve this issue, it becomes necessary to delve deeper into the nature of a *Gerstein* violation. Does the violation consist of illegal custody or illegal denial of a judicial probable cause determination? Does the state violate the Fourth Amendment by keeping in jail people who have had no such determination or by denying such a determination to the people it keeps in jail?

In *Gerstein* and *McLaughlin*, this distinction made no difference to the substantive Fourth Amendment question and was not closely examined. The distinction was present, though, in the posture of the cases and the remedy granted.

Pugh and his co-plaintiff filed a civil class action for declaratory and injunctive relief. *Gerstein* v. *Pugh*, *supra*, 420 U. S., at 106-107. They "did not ask for release from state custody, even as an alternative remedy." *Id.*, at 107, n. 6. If they had, habeas corpus would have been the exclusive remedy. *Ibid.* From the beginning, then, the case was about a right to a judicial determination and not about legality of custody or release from custody. *County of Riverside* v. *McLaughlin*, *supra*, is similar. McLaughlin sought and received an injunction ordering the county to provide judicial determinations of probable cause within a certain period of time. 114 L. Ed. 2d, at 58, 111 S. Ct., at 1666. Again, this is a case of illegal denial of a determination, not illegal detention.

A hypothetical will illustrate the distinction more clearly. Suppose the police arrest a notorious serial killer.

They inadvertently fail to obtain a prompt probable cause determination, and they discover this error 49 hours after arrest. At the moment of discovery, what is the officers' duty?

If the violation is one of illegal custody and if an immediate *Gerstein* determination is not possible, then they would commit a knowing violation by keeping him in custody. The officers' duty would be to release him to kill again. A willful violation of this clearly established right would subject them to personal liability. See *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987). On the other hand, if the violation consists of failure to provide a *Gerstein* determination, the officers' duty would be to keep the killer in jail and obtain the determination as quickly as possible. In that event, while the county would be civilly liable for the negligent violation, there would be no intentional violation.

In the present case, Kitrich Powell was properly arrested on probable cause for the crime of beating a four-year-old girl into a coma (a charge later changed to murder when she died). *Powell* v. *State*, 838 P. 2d 921, 923 (Nev. 1992). To say that his custody became illegal upon the lapse of 48 hours is to say that the police were legally obligated to release him at that time. That is patently absurd.

Given that Powell was arrested without a warrant, the county was obligated under *Gerstein* to provide a prompt judicial determination of probable cause. With the hindsight of *McLaughlin*, we can now see that this duty was breached by making that determination on Tuesday, November 7, rather than Sunday, November 5, although that was not obvious at the time. Under the new regime of full civil retroactivity, see *Harper* v. *Virginia Dept. of Taxation*, 125 L. Ed. 2d 74, 86, 113 S. Ct. 2510, 2517 (1993), Clark County may be civilly liable for money damages. See Part III.D., *post*, at 22-24. But what has this delay in the determination of probable cause got to

do with Powell's appeal from his criminal conviction for murder? The answer, *amicus* submits, is that it is completely irrelevant.

Powell was legally in custody on November 7, when he made his statement. The magistrate made the probable cause determination the same day, evidently without Powell's presence.[4] Assuming for the sake of argument that Powell's statement preceded the determination, he made the statement at a time when the county was in violation of *Gerstein/McLaughlin*. There is, however, no causal link between the tardiness of the magistrate's *ex parte* determination and Powell's decision to make the statement.

A full adversary hearing with representation by counsel might indeed stiffen an arrestee's resolve not to talk, but *Gerstein* held quite squarely that such a hearing is not required. 420 U. S., at 123. If the minimal *Gerstein ex parte* determination had been made, a police officer might, in addition to reading the *Miranda* card, inform the arrestee "A judge reviewed your case yesterday and confirmed we had cause to arrest you." Is this information likely to make the suspect *less* willing to talk? It would seem more likely to have the opposite effect.

To make a case for suppression, a defendant must establish that but for the violation, the state would not have the evidence. The violation was the failure to make the minimal judicial determination required by *Gerstein* within 48 hours. Keeping defendant in custody was not a violation. Had the violation not occurred, i.e., had the magistrate made his *ex parte* determination two days earlier, the influences on defendant's decision to make his statement would have been no different. The state would

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4. According to Powell's state appellate counsel, he was not brought before a magistrate until November 13. Brief for Appellant in the Nevada Supreme Court 82, Exhibit 1 to Respondent's Brief in Opposition to the Certiorari Petition.

have the evidence anyway. The threshold requirement for suppression has not been met.

C. Strength of Linkage.

"Sophisticated argument may prove a causal connection between" a violation and the prosecution's evidence, but exclusion of the evidence does not necessarily follow. *Nardone* v. *United States*, 308 U. S. 338, 341 (1939). If the defendant can clear the initial logical hurdle by establishing "but for" causation, the question remains whether the connection between the illegality and the evidence is strong enough to justify exclusion, "[a]s a matter of good sense." *Ibid.*

In making this "good sense" determination, a court must bear in mind that the defendant is asking that the trial process be made less reliable, less worthy of the public's confidence, and less likely to ascertain the truth. "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." *Id.*, at 340.

The most common type of "weak linkage" case is the "attenuation" line of cases typified by *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Wong Sun was arrested without probable cause, arraigned, and released. He later returned to the police station of his own volition and made a statement. *Id.*, at 491. The illegality was the cause of the statement in the sense that but for the initial arrest, the chain of events leading to the statement would never have begun. Nonetheless, Wong Sun's act of free will had intervened. The connection was sufficiently "attenuated." *Ibid.* The statement was deemed not to have been obtained by *exploitation* of the illegality. Cf. *id.*, at 488 (use of codefendant's statement was exploitation).

A "closer, more direct link" is required when the evidence defendant seeks to exclude is the live, in-court

testimony of a witness. *United States* v. *Ceccolini*, 435 U. S. 268, 278 (1978). In *Ceccolini*, the police might never have known that a particular witness had relevant knowledge but for the illegal search. *Id.*, at 273. Even so, the linkage between the illegality and the evidence was held insufficient to justify exclusion. See *id.*, at 279-280. As a matter of common sense, it is difficult to say the state is exploiting the illegality when it offers the live testimony of a percipient witness who is more than willing to tell what she knows.

The root question in this line of cases is whether the evidence was obtained by exploitation of the illegality. With searches, this is always a serious danger, because the very purpose of a search is to gather evidence. In the case of an arrest without a warrant and without probable cause, the danger is also substantial, for it has been a common abuse to arrest people without probable cause for the specific purpose of getting a custodial confession. See, *e.g.*, *Brown* v. *Illinois*, *supra*, 422 U. S., at 605; *Dunaway* v. *New York*, 442 U. S. 200, 216 (1979).

However, the *Gerstein* exclusion question, by definition, arises only when the defendant was arrested with probable cause, and the illegality consists solely of the timing of the magistrate's confirmation of that fact. See *ante*, at 7-8. Unlike searches and unlike arrests "for questioning," a *Gerstein* violation is rarely, if ever, motivated by a desire to obtain evidence, since it is possible to comply with *Gerstein* without hindering the evidence gathering process in the least. See *ante*, at 10. *Gerstein* violations are caused by the failure of a complex system, which is comprised of many actors and subject to many demands and constraints, to place a sufficient priority on prompt determination of probable cause.

In this case, unlike *Ceccolini*, it is possible to say that, for this class of cases as a whole, the evidence is not obtained through exploitation of the illegality. Cf. 435 U. S., at 274-275. When the arrest is valid, the statement

is truly voluntary, *Miranda* and its accretions have been complied with, and the right to counsel, if attached, has been respected, the mere delay in judicial confirmation of probable cause, by itself, lacks the strength of connection to defendant's statement needed to justify the exclusion of valid, probative evidence.

III. The costs of an exclusionary remedy for *Gerstein* exceed the benefits.

A. The Exclusionary Rule.

Whenever a new setting for the application of the exclusionary rule is considered, the question of whether the heavy costs of exclusion are justified by the benefits must be addressed. The considerations involved in this question are often similar to those in the causation question,[5] but cost-benefit analysis is a distinct inquiry.

Unlike the "attenuation" cases, see Part II.C., *ante*, at 14-16, this Court's cost-benefit analysis decisions have not gone case-by-case, but have made the exclusion or no-exclusion decision for an entire category of cases. Evidence obtained from a warrantless illegal search or an arrest without probable cause, and not attenuated, is excluded from the prosecution's case in chief. *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961); *Wong Sun* v. *United States*, 371 U. S. 471, 485-486 (1963). Also, such evidence cannot be used to impeach a defense witness other than the defendant himself. *James* v. *Illinois*, 493 U. S. 307, 320 (1990).

Whenever an application is removed from the core of the exclusionary rule to any substantial degree, however,

5. Compare, for example, *Walder* v. *United States*, 347 U. S. 62, 65 (1954), refusing to let a defendant exploit suppression to commit perjury, with *Segura* v. *United States*, 468 U. S. 796, 815, n. 10 (1984), refusing to recognize under "but for" causation the fact that without the illegal seizure the defendants could have destroyed the evidence.

this Court has almost uniformly held that the costs outweigh the benefits. See *Stone* v. *Powell*, 428 U. S. 465, 489-495 (1976) (relitigation on habeas corpus); *United States* v. *Calandra*, 414 U. S. 338, 349-351 (1974) (grand jury); *Alderman* v. *United States*, 394 U. S. 165, 174-175 (1969) (third party standing); *Walder* v. *United States*, 347 U. S. 62, 64 (1954) (impeachment of defendant's direct testimony); *United States* v. *Havens*, 446 U. S. 620, 627-628 (1980) (impeachment of statements on cross-examination); *Michigan* v. *DeFillippo*, 443 U. S. 31, 37 (1979) (good faith reliance on ordinance); *United States* v. *Leon*, 468 U. S. 897, 913 (1984) (good faith reliance on warrant). Almost any weight removed from the benefit side or added to the cost side is sufficient to tip the balance. That fact indicates that even in the rule's core the balance is very close.

The sole basis for exclusion is the need to deter violations of the Fourth Amendment by removing the incentive to commit them. In the past, various other rationales have been advanced: that there was a connection between the Fourth Amendment and the Fifth, *Boyd* v. *United States*, 116 U. S. 616, 633 (1886); that the exclusionary rule is an inseparable part of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 651, 655-657 (1961); or that the courts somehow protect their own integrity by blinding themselves to the truth, see *Elkins* v. *United States*, 364 U. S. 206, 222-223 (1960). All these justifications have been abandoned. *United States* v. *Leon*, *supra*, 468 U. S., at 905-906 (included in Fourth, connected with Fifth); *Stone* v. *Powell*, *supra*, 428 U. S., at 485 (integrity). The sole question is whether the deterrent benefit is worth the heavy cost of suppressing evidence. *Leon*, *supra*, 468 U. S., at 913.

B. High Costs.

The costs of exclusion are well known to this Court. See, *e.g.*, *Leon*, *supra*, 468 U. S., at 907-908; *Stone* v. *Powell*, *supra*, 428 U. S., at 489-491. *Amicus* will therefore add only a few observations here.

First, the cost of exclusion cannot be measured in statistics. Arguments dismissing the costs as involving "only" some stated percentage of cases, see, *e.g.*, 1 W. LaFave, Search and Seizure, § 1.2(a), pp. 22-23, n. 6 (2d ed. 1987), miss the point. Justice is for real people, not bell-shaped curves. Each person's case is generally that person's only case. The fact that justice has been done in ninety-nine other cases does not make injustice in the hundredth case any less unjust. In the present case, the courts of Nevada will either be forced to blind themselves to the truth of the murder of four-year-old Melea Allen, or they will be permitted to do justice for Melea. There are no percentages.

Second, our system of laws depends entirely on the people's confidence in the law. A system perfect on paper will degenerate into anarchy or dictatorship overnight if the people do not believe in it. In living memory, no rule of law has done so much to diminish public confidence as the exclusionary rule. The sight of a single murderer going free because the constable blundered does incalculable damage to the public's confidence in the law.

Third, while this case does not involve physical evidence, it does involve a vitally important form of evidence. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt* v. *Utah*, 110 U. S. 574, 584 (1884). Aside from drug possession cases, where physical evidence completes the entire case, a voluntary confession is usually the best and most complete evidence available. "Admissions of guilt are more than merely 'desirable,' [citation]; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*,

475 U. S. 412, 426 (1986). This is especially so in cases of murder, where the defendant has often eliminated the only other eyewitness. For courts to turn a deaf ear to evidence of such importance would require an exceedingly compelling justification.

C. Meager Benefit.

What makes this case unlike *Mapp* v. *Ohio*, *supra*, and much more like *Stone* v. *Powell*, *supra*, is the exceptionally meager benefit to be obtained at this high cost. Exclusion of evidence is effective to deter a violation only if the gathering of evidence was the motive for the violation. Gathering evidence usually is the motive for searches, and hence exclusion is thought to be an effective sanction.[6] See *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). However, since defendant proposes extending the exclusionary rule to *Gerstein* violations, the likely motives must be examined afresh.

Once the police properly arrest a suspect, what would cause them to fail to comply with *Gerstein*? One reason probably involved in the present case is an inability to determine what *Gerstein* actually meant by "prompt." See *County of Riverside* v. *McLaughlin*, 114 L. Ed. 2d 49, 62, 111 S. Ct. 1661, 1669 (1991) (insufficient guidance). *McLaughlin* has fixed that problem to a considerable extent by drawing a presumptive line at 48 hours. *Id.*, 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670.

A second reason may be lack of cooperation from the judicial branch. In another case presently before this Court, federal officers attempted to take a suspect before a magistrate as soon as they had booked him into federal

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6. Of course, the worst searches and seizures are those undertaken for harassment, seizing items with no semblance of evidentiary value for the proof of any crime. See, *e.g.*, *Stanford* v. *Texas*, 379 U. S. 476, 479-480 (1965). In such cases, the exclusionary rule is worthless, and the victim of the search must resort to civil remedies. See also *Terry* v. *Ohio*, 392 U. S. 1, 14-15 (1968).

custody, but they were told the magistrate's calendar was full. See Joint Appendix 25 in *United States* v. *Alvarez-Sanchez*, No. 92-1812. The exclusionary rule is meant to deter police misconduct, not judicial misconduct; it is ineffective for the latter. *United States* v. *Leon*, *supra*, 468 U. S., at 916-917. If the magistrate refuses to work weekends in violation of *McLaughlin*, see 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670 (weekends count), the police officers' desire to question the suspect is unlikely to sway that decision.

A third possible motive for delay, in jurisdictions which require the *Gerstein* determination to be made at the same time counsel is appointed, see *McLaughlin*, *supra*, 114 L. Ed. 2d, at 62, 111 S. Ct., at 1669, is to postpone the appointment of an attorney who will surely advise the suspect not to talk. See *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (opinion of Jackson, J.). This possibility cannot be the basis of a constitutional rule of exclusion, however, because the joinder of the *Gerstein* determination with the appointment of counsel is not required. *Gerstein*, *supra*, 420 U. S., at 122. Such a rule would more likely motivate the jurisdiction to drop its local joinder requirement, thereby delaying appointment of counsel until a later stage of the process.[7]

A fourth possibility, and the most likely one in most cases, is an unintentional violation committed by a sluggish bureaucracy. That appears to have been the situation in *County of Riverside* v. *McLaughlin*, *supra*. There is no indication in the opinion that anyone intentionally delayed McLaughlin's initial appearance for the purpose of questioning him, or for any other purpose. See 114 L. Ed. 2d, at 57-58, 111 S. Ct., at 1665-1666.

7. Since there is no federal constitutional right to a preliminary hearing, see *id.*, at 119, the trial itself could be the first proceeding at which the defendant has a federal right to counsel.

Now that *McLaughlin* has set a standard, the "Dickensian bureaucratic machine," see *id.*, 114 L. Ed. 2d, at 72, 111 S. Ct., at 1677 (Scalia, J., dissenting), should normally "churn" at the required pace, but occasionally it will not. The critical question here is what effect an exclusionary rule would have on the churning speed.

An exclusionary rule would, at most, create an interrogation-free zone from the time the *Gerstein*/*McLaughlin* "promptness" limit expires until the time the *Gerstein* determination is made. See *ante*, at 8-9. An investigating officer in a jurisdiction which does not comply with *Gerstein* would have three options. First, he could hurry up his questioning of the suspect to a time before the *Gerstein* issue arises. Second, he could delay his questioning to a time after the *Gerstein* requirement is met. Third, he could try to push the processing of the case through the bureaucracy ahead of other cases.

Only the third option has any deterrent effect whatever on the constitutional violation. But how likely is this scenario? In a high-profile case, assigned to an investigator with influence within the department, it may well happen, but that is not the kind of case *Gerstein* and *McLaughlin* are principally concerned with. The concern is for the "law-abiding citizen wrongfully arrested . . . never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made." *McLaughlin*, 114 L. Ed. 2d, at 72, 111 S. Ct., at 1677 (Scalia, J., dissenting).

How would this victim of sloppy police work be helped by an exclusionary rule? He would not. Indeed, the case so low in priority that it was investigated badly is more likely to be the one "bumped" from the calendar to make room for the high-profile case.

In the routine case, it would be easier for the individual police officers to schedule their questioning around the interrogation-free zone than it would be for them to fight the system. An exclusionary remedy thus provides little

benefit toward preventing violations of the *Gerstein* rule. "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used to effectively control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry* v. *Ohio*, 392 U. S. 1, 15 (1968).

Defendant asks this Court to prescribe a drug with minimal efficacy and major side effects. The first question a competent doctor would ask is whether a more effective, safer drug is available. Yes, one is.

D. Alternate Remedies.

Wolf v. *Colorado*, 338 U. S. 25, 28 (1949) affirmed that the substantive protections of the Fourth Amendment were included within the Due Process Clause of the Fourteenth. "But the ways of enforcing such a basic right raise questions of a different order." *Ibid*. After an extensive survey of jurisdictions, *id*., at 29-30, 33-39, Justice Frankfurter concluded for the majority that it is not "a departure from basic standards" to leave enforcement "to the remedies of private action . . . ." *Id*., at 31.

Wolf was overruled in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). The *Mapp* Court's decision to overrule *Wolf* was based largely on a belief that alternate remedies were inadequate. The *Mapp* Court was particularly impressed with the California holding in *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955), which declared that "other remedies have completely failed to secure compliance with the constitutional provisions . . . ." *Mapp*, 367 U. S., at 651 (quoting *Cahan*).

Much has changed since 1961. The most important development was the enactment in 1976 of 42 U. S. C. § 1988, authorizing reasonable attorneys' fees for prevailing plaintiffs in civil rights cases. Congress passed this law for the specific purpose of enabling plaintiffs to bring civil rights cases which had previously been economically infeasible. *City of Riverside* v. *Rivera*, 477 U. S. 561, 576

(1986) (plurality opinion). With section 1988, a civil suit need not generate a large money damage award to pay the lawyer, since the fees awarded need not be proportional to the recovery. *Ibid*.; *id*., at 585 (Powell, J., concurring).

In 1982, the people of California emphatically repudiated *Cahan* by constitutional amendment, declaring that the exclusionary rule violates the rights of victims of crime. Cal. Const. Art. I § 28(d). See *California* v. *Greenwood*, 486 U. S. 35, 44-45 (1988). They have chosen to rely solely on civil remedies for enforcement of the more expansive search and seizure protections of the state constitution.

In the present case, it is not necessary to reweigh the efficacy of alternate remedies for the typical illegal search of the kinds considered in *Wolf* and *Mapp*. For *Gerstein* involves a different kind of violation, and the differences are significant to the efficacy of the civil remedy.

A major concern in the search area has been that the victims of illegal searches are typically disreputable people to whom juries would be unsympathetic and unlikely to grant significant awards. See Comment, The Tort Alternative to the Exclusionary Rule in Search and Seizure, 63 J. Crim. L. C. & P. S. 256, 262 (1972); Orfield, Deterrence, Perjury, and the Heater Factor: an Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 126 (1992). Since the legality of the search often has little to do with actual guilt or innocence, the potential plaintiffs will very often be criminals, thus justifying this concern.

Gerstein is different. There is a strong connection between the constitutional injury and actual innocence of the offense. The person arrested *without* probable cause is the one the *Gerstein* Court sought to aid. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975). These

consequences are avoided only if the magistrate determines probable cause was lacking and releases the suspect. Suspects committed by the magistrate, on the other hand, spend the same length of time in jail whether the determination is made an hour, a day, or a month after arrest.[8]

Thus the class of people injured by *Gerstein* violations are those arrested by mistake or on flimsy evidence and belatedly released. There is no reason to believe that they are, as a whole, such a disreputable group as to be the objects of universal jury disdain. On the other hand, the group held for trial and seeking to exclude evidence consists primarily of people who have suffered little or no injury from the delay.

Furthermore, the case for damages is much easier to make in a *Gerstein* case than it would be in a traditional search case. Everyone can understand that being held in jail for three days without cause is a tangible injury deserving of compensation. After *County of Riverside* v. *McLaughlin*, *supra*, the case for liability is now simple as well. A plaintiff need only establish the dates and times of the arrest and of the *Gerstein* hearing, and the burden shifts to the defense. *County of Riverside* v. *McLaughlin*, *supra*, 114 L. Ed. 2d, at 63, 111 S. Ct., at 1670. Finally, the fact that *Gerstein* and *McLaughlin* were civil cases demonstrates that it is feasible to obtain counsel and bring civil suits in this area.

Mapp was decided twelve years after *Wolf*. The *McLaughlin* opinion is not even out in official advance sheets as of this writing. It is far too early to pronounce that civil remedies are hopelessly ineffective in enforcing *McLaughlin*. Cf. *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (opinion of Jackson, J.). Defendant's invitation to expand the exclusionary rule should be rejected.

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8. The timing of a bail-setting hearing may affect the time in jail, but that is a different issue.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation